160 L.Ed.2d 734, 747 (2005). The Court noted that such a canon of statutory interpretation "is a tool for choosing between competing plausible interpretations of a statutory text...." *Id.* Thus, once one of the competing interpretation violates a longstanding canon of statutory construction, the inquiry should terminate. The same principle should apply to a *Chevron* analysis.

Here, the Sixth Circuit upheld an agency interpretation that rendered a portion of the statute superfluous. The Court should therefore reverse the Sixth Circuit, and in doing so, explicitly define the bounds of textual interpretation under step one of the *Chevron* analysis.

II. THE SIXTH CIRCUIT'S APPROACH UNDER STEP ONE OF THE *CHEVRON* ANALYSIS ALSO CONFLICTS WITH THE TENTH CIRCUIT.

As Petitioners note, the Sixth Circuit's approach under step one of the *Chevron* analysis exposes a conflict in the circuits as to when a court may look beyond the text of the statute in determining the intent of Congress. *See* Petition, 8-12. Petitioners set forth the varying approaches of the First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits in dealing with step one. *See Id.* This Court should grant certiorari in order to reconcile the mixed messages sent by these circuits.

Amicus DPNM falls within the jurisdiction of the Tenth Circuit. The Sixth Circuit's analysis in *Fullenkamp* also stands in conflict with the Tenth Circuit as to step one of the *Chevron* analysis.

The Tenth Circuit has described its approach to statutory interpretation under step one of the *Chevron* analysis as follows:

> When interpreting the language of a statute, the starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. If we find ambiguity, we may seek guidance from Congress's intent, a task aided by reviewing the legislative history.

Ctr. For Legal Advocacy v. Hammons, 323 F.3d 1262, 1267 (10th Cir. 2003) (citations and internal quotation marks omitted). Thus, if the text of a statute is plain and results in an unambiguous interpretation, the Tenth Circuit does not look to legislative history.

Other decisions by the Tenth Circuit support such a conclusion. For example, in *St. Charles Inv. Co. v. Commissioner*, 232 F.3d 773, 776 (10th Cir. 2002) (citation omitted), the Tenth Circuit indicated that "legislative history may not be used to create ambiguity in the statutory language." In reaching this conclusion, the Tenth Circuit noted: "Where the language of the statute is plain, it is improper for this Court to consult legislative history in determining congressional intent." *Id.* (*citing United States v. Richards*, 583 F.2d 491, 495 (10th Cir. 1978)).

By contrast, the Sixth Circuit in this case proceeded to a review of legislative history even though one of two textual interpretations was unambiguous. In doing so, the Sixth

Circuit essentially used legislative history to create an ambiguity. Such an approach stands in conflict with the Tenth Circuit.

CONCLUSION

For the reasons stated in the Petition and in this amicus brief, the Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

MICHAEL FULLENKAMP, et al.,
Petitioners,

v.

MIKE JOHANNS, as Secretary of Agriculture,
United States Department of Agriculture,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

1. Whether it is ever appropriate under a *Chevron* step one analysis for a reviewing court to accept an agency's statutory construction that renders parts of the statute superfluous when a plain meaning reading of the statute gives a meaning to all words?

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PETITIONERS' REPLY BRIEF

While predictably framed in a manner more supportive of his position, the Secretary of Agriculture's question presented reiterates the Petitioners' request for relief– for the Court to consider whether the Secretary's interpretation of 7 U.S.C. §7982 was properly upheld. As such, the Petitioners do not object to the Court's additionally granting certiorari on that question as presented. The broader issue presented however, concerns whether, in reviewing an agency interpretation of a statute a court may accept that agency interpretation even though words in the statute are rendered superfluous and an alternative plain meaning interpretation does not rewrite Congressional text. Where a plain meaning interpretation exists, the consideration of any alternative construction – even one that can be supported by some legislative history – in a step one *Chevron* inquiry is in error. *Chevron, USA Inc., v. Nat. Resources Def. Council*, 467 U.S. 837 (1984). The issue presented as framed by Petitioner's question accurately explains why this case has implications beyond the immediate question before the Court and why certiorari should be granted.

Contrary to the Government's assertion, the Circuit Court did not conclude that Dairy Farmers' interpretation is "irreconcilable with statutory text." Response at 12. In fact, the section of the opinion that the government refers to is a recounting of the Secretary's argument before that court, beginning with the introductory phrase, "In response, the Secretary asserts. . . ." Following the recitation of the Secretary's position, the Court of Appeals concluded that his position rendered portions of the statute superfluous and that the structure of the Act "impl[ies] that transition payments are not considered payments under § 7982 contracts." Pet. App. 8a-10a. Rather than suggesting that Dairy Farmers'

interpretation is not compelled by the Act, the opinion actually demonstrates that it is the Secretary's interpretation that cannot be supported by the plain meaning.

Since the Court of Appeals found no reason to similarly hold that Petitioners' explanation of the Act was not consistent with the statute, under a purely textual analysis there was only one legitimate interpretation for purposes of *Chevron* step one. This Court criticized a decision of the Circuit Court of Appeals for the District of Columbia when it said, "EPA's construction of the statute cannot "go [] beyond the limits of what is ambiguous and contradict what is...quite clear." *Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S. 457, 481 (2001)

Rather than letting the matter end there as required, the Court of Appeals analyzed the Secretary's interpretation utilizing tools of construction that are, in other Circuits, property reserved for step two of a *Chevron* inquiry. Only by using these tools did the court find the requisite ambiguity by which it ultimately resolved the step one question in favor of the Secretary.

The Secretary contends that this Court should not consider this case to answer the question of whether the courts can utilize a step two analysis of the agency's interpretation to skirt plain meaning. The Secretary's brief itself exhibits the very shift from step one to step two analysis while still saying it is operating in step one analysis. As such it shows the very confusion that permeates the Circuit and district court decisions and supports the need to accept this case.

Phrased differently, the question presented by the Petitioners, and one which this Court should consider, is whether or not an interpretation derived by use of tools only

appropriate in step two be used in the first step analysis with one that does not use such tools.

The Secretary's argument that the plain meaning provides two interpretations, ignores the careful structure of the Act that delineates, in multiple places, the right of producers to choose when to sign a contract. It ignores the careful placement and selection of "subsection (b)" in some cases and "section" in others while it argues that "under subsection (b)" is synonymous with "this section" in (d)(2). The structure and careful wording of this statute is relevant and must be given meaning. *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

The Act challenged here provides a carefully articulated option to producers to choose the month that the Transition Period ends and the contract period commences. 7 U.S.C. § 7982 (c),(g)(2),(h). By capping both payments in contravention of the Act, the Secretary eviscerated a congressional grant to producers. As shown by the *amicii*, that has a substantial economic adverse impact on a large number of producers throughout the nation.

The Government also contends that subsection (g) pulls subsection (h) transition payments into subjection (b). Subsection (g) reads

> (g) DURATION OF CONTRACT.—
>
> (1) IN GENERAL.—Except as provided in paragraph (2) and subsection (h), any contract entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period starting with the

> first day of month the producers on the dairy farm enter into the contract and ending on September 30, 2005.
>
> (2) VIOLATIONS.—If a producer violates the contract, the Secretary may—
>
> (A) terminate the contract and allow the producer to retain any payments received under the contract; or
>
> (B) allow the contract to remain in effect and require the producer to repay a portion of the payments received under the contract based on the severity of the violation.

What this subsection demonstrates is that transition payments are made pursuant to Subsection (h). Furthermore, the exclusion of both terminated contracts and transition payments show that Congress did not find contracts to cover the transition period. It is inconsistent with clear reading to say the exception under (g) means inclusion for (h) but exclusion of (g)(2).

The process used by the Circuit Court turns *Chevron* on its head because, by proceeding to the second step to answer the first, it renders the first step useless. Ignoring unambiguous plain meaning to reach the second step analysis has been rejected by other circuits and this Court and there is, indeed, a conflict to be resolved.

The Secretary's argument that his interpretation is proper because otherwise producers may "evade" the cap, and the Secretary's interpretation "forecloses circumvention" are policy arguments appropriate only in determining if the Secretary is filling the gaps of an ambiguous statute. *See*

Response at 10. Even so, the Petitioners' reading is wholly consistent with the intent of the Act, as well as the text.

The purpose of the Act is to make payments to dairy producers for low market prices, not limit payments to them. In any event, the uncapped transition payment does not violate the purpose of the Act or even the value of capped monthly payments. Producers receiving monthly payments would be inclined to increase production and, as a consequence, drive up the cost of the program. By deferring larger producers' payments until the end of the program, any increase in milk production would, too, be deferred until after the end of the program. *See,* Statement of Senator Leahy, 148 Cong. Rec. S4032 (May 8, 2002).

Recent Court of Appeals decisions show that there remains a conflict in the role of "plain meaning" versus practical arguments. *La Rsolana Architects, PA v Clay Realtors Angel Fire,* —F.3d — , 2005 WL 1799788 (10th Cir. 2005) rejected the "application approach" in determining when a person can sue for copyright infringement. Other circuits use that approach. Finding it "odd that one can possess a copyright but be unable to file suit until it is 'voluntarily' registered by the copyright holder" and that it permitted an infringer to dilute the copyright during the registration process, the Tenth Circuit nonetheless held that the plain meaning required a different interpretation. *Id.* ("this approach requires a topsy-turvy reading" of the pertinent statute.) This is not unlike the government's argument in this case that applying a plain meaning to the Act allows producers "to avoid the cap" by waiting until the end to apply for payments.

The issue of unclear plain meaning was a topic of discussion at a recent American Bar Association seminar. Judicial Section and the Council of Appellate Lawyers,

"Unplain Meaning, Cheap Talk, and Loose Canons: The Continuing Clash over Statutory Interpretation and Proposals for Resolving It" Council of Appellate Lawyers home page, http://www.abanet.org/jd/ajc/cal/home.html (August 2, 2005).

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